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Supreme Court, U.S.
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In The

Supreme Court of the United States

GORDON PAUL COOPER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

TRAVERSE – REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSITION

ROGER S. HANSON, ESQ.
1517 E. 4th Street
Santa Ana, CA 92701
(714) 953-0638
Attorney for the Petitioner;
Member of the Bar
Supreme Court of the United States
Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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TRAVERSE-REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSITION TO GRANT OF CERTIORARI

Petitioner Cooper agrees with the *OPINION BELOW* and *JURISDICTION* at page 1 of the Government Brief. As to the *STATEMENT* commencing at page 1 and concluding at page 4, petitioner asserts certain errors therein:

1. At the bottom 4 lines of page 2, not only did petitioner Cooper not instruct Mier to prepare false weighmaster certificates that misrepresented the cargo weight of the trucks, but in fact petitioner Cooper would have *no reason* to not have the trucks consistently and honestly weighed, for that was the only way that billing was done with the City of San Diego. Moreover, petitioner paid Mier $5.00 per truck, under the belief that the trucks were being weighed. In addition, it was also true that the City had a fully independent and accurate evaluation of the sewage sludge loaded on each truck at the Fiesta Island truck loading facility, because a sensitive weighing device attached to the "skip loading" heavy equipment summed up the load placed on each truck. At trial, the billed amount virtually equalled the City's loading of truck figures. And finally, petitioner Cooper, concerned only with the transport of the sludge in the field, spent no time whatsoever in the CCF office assembling and tallying-up and mailing the weight certificates to the City of San Diego. That was done by accountants. Petitioner knew nothing of the falsification.

2. At page 3, line 11 of the Government Brief is a terse comment that petitioner Cooper "directed night shipping of sludge to a farm in Imperial County, California." In truth, night shipping was resorted to because the presence of sunlight and higher day temperatures caused evaporation of key ammonia and nitrate components of the sludge, making it less a valuable fertilizer, and secondly, highway traffic was less onerous in the Southern California area at night.

3. At page 3, lines 12-16, it is true that petitioner Cooper did not notify either the City or the Water Board of the change of deposit of the sludge to Imperial County California farmland after February 1993, because 40 CFR 503.10, 503.12, and 503.12(j), the newly enacted federal law, specifically excused this notice if, as here, the sewage sludge was non-hazardous, i.e. below the allowable maximum figures for undesirable chemicals, pathogens, and vectors (rodents) in the sludge.

THE ARGUMENTS OF THE SOLICITOR GENERAL

(FAGES 5-8, GOVERNMENT BRIEF)

1A. STATE LAW v. FEDERAL LAW

Initially it is to be noted that indeed the Supremacy Clause of the U.S. Constitution is implicated, for the U.S. Ninth Circuit at Pet.App. A-12, opinion, *U.S. v. Cooper*, stated:

> "Nothing in this part precludes a *state* or political subdivision thereof . . . from imposing requirements for the use or disposal of sewage sludge *more stringent than the requirements in this part or from imposing additional requirements for the use or disposal of sewage sludge.*"

Thus the Ninth Circuit essentially wrote out of 40 CFR 503 and its sub-sections 503.10 and 503.12 the general requirements in Section 503.12, which did not apply when the bulk sewage sludge is applied to the land if the bulk sewage sludge meets the pollutant concentrations in Section 503.13(b)(3), the Class A pathogen requirements in Section 503.32(a), and one of the vector attraction reduction requirements in Section 503.33(b)(1) through (b)(8).

The Ninth Circuit purported to say that "independent and higher state standards," or perhaps "states rights," could command a violation of a federal law assertedly contained in 33 U.S.C. 1319(C)(2)(A) even though subsequent, later, scientifically based federal law

in 40 CFR had determined that certain sewage sludge could be safely directly applied to the land, thus enhancing its use as a fertilizer. Thus, to the extent that the Ninth Circuit asserted some sort of preeminence in the local state standards, Article IV, Clause 2 is surely implicated.

1B. FEDERAL LAW v. FEDERAL LAW

Initially it is to be noted that the Solicitor General contends that no federal vs. state conflict is here occurring, that the conflict is between two sources of federal law, 33 U.S.C. 1319(C)(2)(A) and 40 CFR 503 (Page 5, Govt. Brief).

If that be conceded, then it is clear that the subsequently enacted 40 CFR 503 (Feb. 19, 1993) which deals exactly and directly with the late, scientifically based allowable direct deposit of sewage sludge to land, must take precedence, for 40 CFR 503 specifically invokes the NPDES permit in *not requiring Notice* if the sludge contaminants are below specified levels.

A fair examination of the instant NPDES permit reveals but a small area of it addressing the requirements that "the discharger shall comply with all existing federal and state laws and regulations that apply to its sewage sludge use . . . " (Paragraph 9, page 30) and requirements to give written notice to the Executive Officer of any changes planned in the dischargers sludge use or disposal practice. In full, paragraphs 9 and 10 at page 30 of the NPDES permit are set forth in Appendix A.

It is clear that as to paragraph 10 of the NPDES permit, 40 CFR 503.10 and 503.12 dispense with "prior written notice," and make it not required.

Paragraph 14, page 31 could be contended relevant and it appears in Appendix A as well, as does pages 36, 40, of the NPDES permit.

Once again, 40 CFR 503.10 and 503.12 nullify the Notice Requirements of the above area of the NPDES permits. Hence, if it be admitted by the government that

a conflict exists in the federal law, i.e. whether the existing NPDES permit takes precedence over the newer and specific 40 CFR 503 regulations dealing specifically with sewage sludge applied to land, it is submitted that the newer and specific 503 regulations must control in a federal-federal law conflict. Where such an obvious conflict exists, can a federal crime be charged for a claimed violation of the NPDES permit?

Certiorari must be granted in this key case of first impression involving environmental issues.

2. THE RULE 52(b) ISSUE, "PLAIN ERROR" WHERE THE FAILURE TO OBJECT AT TRIAL TO GOVERNMENT WITNESS PERJURY AND GOVERNMENT SUPPRESSION OF PROOF OF THAT PERJURY WAS BECAUSE THE GOVERNMENT HID THE TRUTH. (GOVERNMENT BRIEF 7, 8)

Once again Petitioner asserts that an issue of first impression is presented: If the government structures and allows key perjury to occur in a federal jury trial and further willfully suppresses key evidence that would establish that perjury, can F.R. Crim.P 52(b) ever be applied under a claim that the defendant had failed to assert or object to the perjury at trial, and therefore, unless governmental perjury is "plain error," it can never be attacked on appeal? Once again the U.S. Solicitor General circumvents logical, and on the merits, discussion of this issue in a terse and truncated single page treatment at page 7, section 2 of the Government Brief in Opposition.

This Petitioner vehemently objects to any assertion that "there was ample evidence of petitioner's guilt even without Mier's testimony." In fact *Mier was the key and only witness* on the major series of perjured explanations of the printing of the weigh slips. Mier told 3 different versions, but each version clearly implicated petitioner Cooper in the generation of the "weigh slips," while the

government concealed an FBI 302 report that had established that the "weigh slips" had not been printed where Mier had testified, under oath before the grand jury and at trial, as to the place of printing. Indeed, petitioner denied any knowledge or involvement in the printing of false weigh slips, he believing and assuming that Mier was causing each truck to be weighed because that is how petitioner's company, Chino Corona Farms, was able to correctly bill the City. Not only would Petitioner have no reason to not have the trucks weighed, but Mier readily admitted that he, Mier, had been paid and had been allowed $5.00 per weighing. Significantly, the City of San Diego *also weighed the contents* of the sewage sludge via a recording device on the heavy equipment used to load the trucks at Fiesta Island. In fact, it was really undisputed that the City's figures virtually identically coincided with the false weigh slip figures, for each truck was generally loaded to the same amount each time. Mier was therefore readily able to place a figure on the weigh slip without weighing the truck which truly represented very closely the amount of sludge there carried.

It is important to realize that petitioner did not know of Mier's false scheme, which allowed him to pocket $5.00 for each false weigh slip.

The U.S. Government and its counsel AUSA Melanie Pierson willfully allowed this perjury to occur, and no other evidence other than Mier's perjury laid this scheme at the footsteps of Petitioner Cooper. While Mier was, admittedly, shown to have made 3 inconsistent statements regarding the birth and genesis of the "weigh slips," each of the three still implicated petitioner Cooper no matter which the jury believed. Withheld from the jury and suppressed from the defense was the fact that Mier was lying about all 3 separate incidents.

In short, the Response of the Solicitor General at pages 7 and 8 does not deal in any way with the merits of this key issue of First Impression, i.e., use of Rule 52(b) to disallow attack on this extensive perjury. Certiorari should be granted.

3. THE IMMUNITY ACTUALLY GIVEN TO GOVERNMENT WITNESS MANUEL MIER FOR 4 SEPARATE CRIMES, AND FAILURE TO DIVULGE TO THE TRIAL JURY THAT SAID IMMUNITY WAS GIVEN. (GOVERNMENT BRIEF PAGE 8)

The government devotes but two paragraphs at page 8 of its Brief to this key constitutional issue. Petitioner Cooper reviews the 4 separate crimes of Manuel Mier:

1. Mier testified before the jury that he falsely forged and filled out weigh slips for the trucks hauling sewage from Fiesta Island to Mexico, thus admitting to the same general crime that petitioner was being prosecuted for; indeed, Mier was *THE SOLE KEY WITNESS* on the counts of mail fraud, i.e. the mailing of these false weigh slips via U.S. Mail to the City of San Diego. Petitioner, however, never even saw the weigh slips, as lower level personnel did the accounting and mailing at CCF. Mier was never arrested, charged, indicted, or prosecuted for that crime.

2. Prior to trial Mier was extensively interrogated by FBI Agent David Strange on March 26, 1996 in Mexico. The report of the interrogation was provided to defense counsel, and in key revelation at pages 6 and 7, FBI agent Strange reported that Mier told Strange:

> Mier advised that he completely understood that the Calexico Scale Company and the Quality Scale Company did not exist. Mier knew that he was forging these certificates. Mier did not know where these certificates came from. He advised that these certificates were given to him by Gordon Cooper and Cooper provided no explanation as to their origins. He did state, that one time in Mexico, he saw Cooper go into a print shop in Mexicali, he did not know what Cooper was doing inside this print shop nor did he remember the exact name of the print shop nor its address. Mier did advise, that he remembered the approximate location of the print shop

> and would try to provide that information to SA David Strange as soon as possible.
>
> Mier advised that the reason he worked for Chino Corona Farms and did the things he did during this time was for the money. He stated that he is not wealthy and has experienced economic difficulties both before he worked for Chino Corona Farms and after. He states that he no longer owns his own truck, as he did at that time, as he has had to sell it in order to feed his family.
>
> At this time, SA Strange served Mier a Federal Grand Jury subpoena, ordering Mier to appear before the Federal Grand Jury on April 3, 1996, at 1:00 P.M. Mier stated that he would comply with the order on the subpoena. He did state, that he did not have a car that could cross legally into the United States, but would try to make other arrangements. He would contact SA Strange if he had any problems making these arrangements. He stated he would contact SA Strange by April 1, 1996, if there were any problems.

It is revealed later that these statements of Mier as to his not knowing where the "weigh slips" came from, but inferentially were produced by Cooper's solo entry into the non-named print shop, were obvious lies to an FBI agent and thus a violation of 18 U.S.C. 1001. See as to this specific crime *Brogan v. United States*, 522 U.S. 398, 118 S.Ct. 805 (1998). That is because on April 4, 1996, Mier was placed before the U.S. Grand Jury in San Diego, and stated under oath a diametrically opposite set of facts: that he, Mier, and petitioner Cooper jointly entered a then non-named print shop and jointly arranged for the printing, Mier translating English to Spanish. At no time did AUSA Melanie Pierson, then representing the government, and who would become the government trial attorney, ask Mier about the above contradictory FBI statement, nor advise the Grand Jury of the inconsistency.

Obviously either the March 26, 1996, statement to FBI Agent Strange was a federal crime, i.e., a violation of 18 U.S.C. 1001, or the Grand Jury testimony was a crime, a violation of 18 U.S.C. 1623.

As revealed after petitioner's conviction, FBI agents had gone to the Impremex Print Shop on April 25, 1996, apparently named by Mier shortly after the April 4, 1996, Grand Jury testimony, and had learned that the false weigh slips had not been printed there. See Pet.Cert.App. D-1 and D-2. This report was willfully suppressed from the defense at trial, allowing AUSA Melanie Pierson to present yet other, and different, clearly known to be perjured, evidence before the trial jury, namely that Mier, petitioner Cooper, and one "Barilla" or "Padilla" had entered the now-named Impremex Print Shop and had ordered the printing of the false weigh slips. At no time did AUSA Melanie Pierson disclose that United States FBI agents had learned that the printing had never been done where her key witness, Mier, claimed it had been done, on April 25, 1996.

It is clear, therefore, that Mier was potentially indictable and chargeable with 4 separate federal crimes;

a) the 18 U.S.C. 1001 false statement to FBI agent Strange on March 26, 1996;

b) the 18 U.S.C. 1623 false statements before the April 4, 1996, Grand Jury in San Diego;

c) the false trial testimony before the jury that he, Mier, petitioner Cooper, and one "Padilla" had jointly arranged for the printing at the "Impremex" Print Shop;

d) Mier's admission to the government, and before the jury, that he had personally committed crimes in forgery and falsification of the weigh slips, and the filling out of these slips without causing the trucks to be weighed.

It is of interest that this very office of the U.S. Solicitor General prevailed in *Brogan v. United States*, 522 U.S. 398, 118 S.Ct. 805 (1998), to persuade this Honorable

Court to hold that even a single, simple, mere answer of "No" to a federal agent's questions, if false, was a criminal violation of 18 U.S.C. 1001. (Possible $10,000 fine and/or 5 years imprisonment).

At 118 S.Ct. 805, 809, this Court held, "In any event, we find no basis for the major premise that only those falsehoods that pervert governmental functions are covered by 1001."

At 810, this Court held:

> "Whether or not the predictment of the wrongdoer run to ground tugs at the heart strings, *neither the text nor the spirit of the Fifth Amendment confers a privilege to lie.*"

The U.S. Ninth Circuit at Pet.App. A-20 stated:

> "As the defense established at trial, Mier's credibility was shaky at best. *He faced potential criminal prosecution in the United States,* so it seems unlikely that he would return to testify only because he wanted to tell the truth."

That Court ruled that this was "circumstantial evidence" of an immunity agreement but that "more direct evidence" must be presented.

However, as asserted in the petition at page 27, only 2 entities knew the truth – Mier himself, and the office of the U.S. Attorney. It is known, however, that as of November, 1999, many years after Mier's many federal crimes, he has never been indicted, charged, or prosecuted. He never will be, as now the statute of limitations has expired.

The issue on Certiorari is whether the government must disclose, before the jury, that it does not intend to prosecute its witness for a lengthy series of federal crimes, especially where, as here, the witness denies any "deal" had been made to him.

The Brief of the U.S. Solicitor General totally eschews and sidesteps response to this issue. Mier was a *VERY KEY*, indeed *THE ONLY KEY*, government witness on the "weigh slip" charges, and the petitioner Cooper denied

knowing about Mier's falsification of, and printing of, weigh-slips. Can it be honestly contended that the jury, being deprived of the fact that the printing was not done where Mier claimed it to be, as determined in the suppressed F.B.I. report of April 25, 1996, set forth Petition App. D-1-D-2, in no way affected this conviction? Therefore this was governmental suppression of a deal made to Mier and suppression of the fact that Mier was committing perjury with the full acquiescence of the United States Attorney before this jury.

The U.S. Solicitor General fails to analyze and refute the obvious facts and contentions of this key constitutional deprivation of due process at page 8, item 3. Certiorari should be granted.

CONCLUSION

Presented in this petition are issues never resolved by this Honorable Court, including, (a) interpretation of key environmentally impacting 40 CFR 503; (b) whether failure to object to perjured government trial evidence, proof of the perjury being itself suppressed, should allow invocation of the "Plain Error Rule" of F.R. Crim. Proc. 52 (b); and (c) whether the government and its trial counsel can willfully suppress the fact that immunity was in fact given to its key trial witness for at least four major federal crimes where the said witness was interrogated about the immunity before the jury and denied it.

The Brief of the Government truly dodges discussion of, and provides no authority to support, their requested Denial of Certiorari (Page 9, Govt. Brief). Certiorari should therefore be granted.

Dated: November 8, 1999

Respectfully submitted,

ROGER S. HANSON
Counsel to Petitioner
Member of Bar
U.S. Supreme Court
Counsel of Record

APPENDIX A

NPDES PERMIT EXCERPTS

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9. The discharger shall comply with all existing federal and state laws and regulations that apply to its sewage sludge use and disposal practice(s), and with the CWA Section 405(d) technical standards when promulgated. If an applicable management practice or numerical limitation for pollutants in sewage sludge is promulgated under Section 405(d) of the CWA after issuance of this Order and is more stringent than the sludge pollutant limit or management practice specified in this Order or in existing federal or state laws or regulations, this Order may be modified or revoked and reissued to conform to the regulations promulgated under Section 405(d) of the CWA. The discharger shall comply with the limitations by no later than the compliance deadline specified in the applicable regulations as required by Section 405(d) of the CWA.

10. The discharger shall give prior written notice to the Executive Officer of any change(s) planned in the discharger's sludge use or disposal practice.

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14. The discharger shall, at all times, properly operate and maintain all facilities and systems of treatment and control including sludge use and disposal facilities (and related appurtenances) which are installed or used by the discharger to achieve compliance with the conditions of this Order. Proper operation and maintenance includes effective performance, adequate funding, adequate operator staffing and

training, and adequate laboratory and process controls including appropriate quality assurance procedures. This provision requires the operation of backup or auxiliary facilities or similar systems only when necessary to achieve compliance with the conditions of this Order.

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E. REPORTING REQUIREMENTS

1. The discharger shall file a new Report of Waste Discharge not less than 180 days prior to the following:

   a. Addition of a major industrial waste discharge to a discharge of essentially domestic sewage, or the addition of a new process or product by an industrial facility resulting in a change in the character of the wastes.

   b. Significant change in disposal method (e.g., change in the method of treatment which would significantly alter the nature of the waste).

   c. Significant change in disposal area (e.g., moving the discharge to a disposal area significantly removed from the original area, potentially causing different water quality or nuisance problem).

   d. Increase in flow beyond that specified in this Order.

   e. Other circumstances which result in a material change in character, amount, or location of the waste discharge.

   f. Any planned physical alterations or additions to the permitted facility.

2. The discharger shall give advance notice to the Executive Officer of any planned changes in the permitted facility or activity which may result in noncompliance with the requirements of this Order.

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9. The discharger shall provide adequate notice to the Executive Officer of the following:

   a. Any new introduction of pollutants into the discharger's treatment works from an indirect discharger which would be subject to Sections 301 or 306 of the CWA if they were directly discharging those pollutants.

   b. Any substantial change in the volume or character of pollutants being introduced into the discharger's treatment works by a source introducing pollutants into the treatment works at the time of issuance of this Order.

   c. Any planned physical alterations or additions to the permitted facility, or changes planned in the discharger's sludge use or disposal practice, where such alterations, additions, or changes may justify the application of permit conditions that are different from or absent in the existing permit, including notification of additional disposal sites not reported during the permit application process, or not reported pursuant to an approved land application plan.

   d. For purposes of this paragraph, adequate notice shall include information on:

      1) The quality and quantity of effluent introduced in the POTW, and

2) Any anticipated impact of the change on the quantity or quality of effluent and/or sludge to be discharged from the POTW.

APPENDIX B

United States Code

33 U.S.C. 1319(C)(2)(A)

(2) Knowing violations

Any person who –

(A) knowingly violates section 1311, 1312, 1316, 1317, 1318, 1321(b)(3), 1328, or 1345 of this title, or any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by the Administrator or by a State, or any requirement imposed in a pretreatment program approved under section 1342(a)(3) or 1342(b)(8) of this title or in a permit issued under section 1344 of this title by the Secretary of the army or by a State, shall be punished by a fine of not less than $5,000 nor more than $50,000 per day of violation, or by imprisonment for not more than 3 years, or by both. If a conviction of a person is for a violation committed after a first conviction of such person under this paragraph, punishment shall be by a fine of not more than $100,000 per day of violation, or by imprisonment of not more than 6 years, or by both.